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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1591

FREDERICK SNARE CORPORATION,

Petitioner,

against

VIGO STEAMSHIP CORPORATION and MARSHIP CORPORATION OF MONROVIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The respondent Vigo Steamship Corporation respectfully prays that the petition for a writ of certiorari to review the decision of the Court of Appeals of the State of New York of February 19, 1970 be denied.

Jurisdiction

The statute under which petitioner invokes this Court's jurisdiction, 28 U.S.C. §1254(3), does not confer upon this Court jurisdiction to review the decision of the Court of Appeals of the State of New York by writ of certiorari. Section 1254(3) of Title 28 deals with the review by this

Court by certified question of cases "in the courts of appeals", which reference is clearly to the United States Courts of Appeals for the various circuits, and not to the State courts. If there is jurisdiction to review the decision of the New York Court of Appeals it would have to lie under 28 U.S.C. §1257(3). It is respectfully submitted that the issues raised by petitioner in this petition are not such as to confer upon this court jurisdiction to review the decision under 28 U.S.C. §1257(3).

Questions Presented

1. Do the courts of the State of New York, which have admiralty jurisdiction, also have jurisdiction to enforce arbitration agreements contained in maritime contracts?

2. May the courts of the State of New York in the exercise of their jurisdiction consolidate two arbitrable disputes involving a common question of law or fact arising out of a maritime transaction?

3. Is there a "substantive" rule of federal law forbidding the consolidation of arbitration proceedings involving maritime transactions?

REASONS FOR DENYING THE WRIT

POINT I

The courts of New York have concurrent jurisdiction in admiralty matters and had the power to enforce the arbitration agreements contained in the charter parties and to consolidate two arbitrations involving a single, common issue.

Petitioner has made a serious error in its statement of the questions presented. In its question No. 1 petitioner states that the arbitrations herein arise under the United States Arbitration Act, 9 U.S.C. §1 *et seq.* This is incorrect and misleading. The arbitrations herein arise out of agreements to arbitrate contained in two charter parties. Respondent applied to the Supreme Court of the State of New York pursuant to the New York arbitration statute, CPLR §7501 *et seq.*, for the enforcement of its agreement with petitioner, and to compel petitioner to arbitrate in a single, consolidated proceeding with all the parties present since the disputes under the charter parties involved a single, common issue. The federal arbitration act was not invoked. On the contrary, this matter arose in the courts of New York under the New York Civil Practice Law and Rules, in the exercise by the courts of New York of their concurrent jurisdiction over maritime matters.

Section 1333 of Title 28 of the United States Code confers upon federal district courts original jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases", however, "all other remedies to which they are otherwise entitled."

It is a basic principle that by virtue of the "saving to suitors" clause of 28 U.S.C. §1333 state courts have juris-

diction concurrent with federal courts in maritime matters, and, therefore, can compel arbitration of disputes arising out of maritime transactions. In the case of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1923), *revg. Matter of Red Cross Line*, 233 N. Y. 373 (1922), the United States Supreme Court held that by virtue of the savings clause, New York had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement to arbitrate contained in a maritime contract.

In its opinion, the Supreme Court discussed the various remedies that state courts may employ in maritime causes of action under the "saving to suitors" clause, and concluded that with the exception of the remedy *in rem*, "the State, having concurrent jurisdiction, *is free to adopt such remedies, and to attach to them such incidents, as it sees fit*" (emphasis supplied), 264 U. S. 123-124. With respect to the New York Arbitration Law of 1920, the arbitration statute there under consideration, the Court further stated:

> "The Arbitration Law deals merely with the *remedy* in the state courts in respect of obligations voluntarily and lawfully incurred. *It does not attempt to modify the substantive maritime law or to deal with the remedy in courts of admiralty.*" (emphasis supplied) 264 U. S. 124

In light of the specific holding in the *Red Cross Line* case that a state court in admiralty matters is "free to adopt such remedies, and to attach to them such incidents, as it sees fit", it is indisputable that the courts of New York could not only compel arbitration pursuant to CPLR §7503, but also, as an "incident" to that remedy, order consolidation of two arbitrations involving

a single, common issue in order to avoid unnecessary costs and delay. The courts of New York may consolidate arbitration proceedings when there is a common question of law or fact and when there is no prejudice to a substantial right. *Matter of Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 12 N. Y. 2nd 409, 240 N. Y. S. 2nd 23, 190 N. E. 2d 418 (1963); *Matter of Chariot Textiles Corp.* v. *Wannalancit Textile Co. and Kute Kiddies Coats, Inc.*, 18 N. Y. 2d 793, 275 N. Y. S. 2d 382, 221 N. E. 2d 913 (1966).

Since the decision in the *Red Cross Line* case, the Supreme Court has re-affirmed the concurrent jurisdiction of the states in maritime matters; *Madruga* v. *California*, 346 U. S. 556 (1954); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959); and upon the authority of the *Red Cross Line* case New York courts have continued to exercise their concurrent jurisdiction to enforce arbitration clauses contained in maritime contracts, and to entertain petitions under the New York arbitration statute to compel arbitration of maritime disputes. *Matter of T. J. Stevenson & Co.* v. *International Coal Corp.*, 15 Misc. 2d 904, 185 N. Y. S. 2d 599 (Sup. Ct. 1953); *Matter of H. V. B. Smith* v. *Polar Cia De Navigacion Ltda.*, 15 Misc. 2d 301, 181 N. Y. S. 2d 368 (Sup. Ct. 1958); *Matter of First National Oil Corp.* v. *Arrieta*, 2 Misc. 2d 225, 151 N. Y. S. 2d 309 (Sup. Ct. 1956), *aff'd* 2 A. D. 2d 590, 157 N. Y. S. 2d 313 (2nd Dept. 1956), *appeal dismissed* 2 N. Y. 2d 992, 163 N. Y. S. 2d 604, 143 N. E. 2d 341 (1957). This Court has also upheld the constitutionality of the federal arbitration act, modeled after the New York Arbitration Law of 1920, when applied to arbitrations arising out of maritime transactions against objections that it unconstitutionally enlarged the power of admiralty courts. *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263 (1932).

Petitioner's contention that the decision of the New York Court of Appeals undermines "national uniformity" in maritime matters is groundless, and indicates that petitioner seriously misunderstands the concept of uniformity, and is unaware of the recognized and well established authority of state courts in maritime matters.

First, as will more fully be shown in Point II of this Brief, the decision of the New York Court of Appeals is not contrary to any principle of federal law, and made no inroads upon the uniformity of the maritime law.

Second, it is fundamental that the states have a wide scope in fashioning rules to be used as rules of decision in admiralty matters, even when these rules conflict with rules of maritime law which do not require uniformity. *Romero* v. *International Terminal Operating Co.*, *supra* at 373-374; *Just* v. *Chambers*, 312 U. S. 383 (1941). In the latter case, the Supreme Court, per Chief Justice Hughes, stated with respect to uniformity in maritime matters:

> "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just* v. *Chambers*, *supra* at 392.

It is respectfully submitted that the procedural issue herein does not involve "the essential features of an exclusive federal jurisdiction." There is no "repugnancy" in the New York court's decision to the "characteristic features" of the admiralty law. (See *Just* v. *Chambers*, *supra* at 392). Petitioner has failed to demonstrate a need for uniformity in this particular procedural situation that would deprive the New York courts of their concurrent jurisdiction over maritime matters.

The decision of the Court of Appeals dealt solely with a procedural matter, and merely established that one,

not two, arbitration proceedings will be used to decide disputes involving a single, basic issue, which, in the present case, is the question of liability for the hull damage to the M/V NICOLAS MARIS. It makes no inroads upon the rules of admiralty law that the *arbitrators* are to apply in resolving this single issue, and does not reach the merits of the dispute over this issue. It simply affirmed the power of the courts of New York to control actions and proceedings within their jurisdiction in order to expedite the resolution of disputes, and to avoid duplication of effort and unnecessary costs and delay.

It was conceded in the state courts that if the parties had proceeded by way of actions at law rather than by arbitration, the resulting lawsuits would have been subject to consolidation (Petition, page 28). Surely, in that event petitioner could not have argued that the consolidation of the lawsuits violated the uniformity of the admiralty law and was forbidden. That the parties chose to arbitrate their disputes should make no difference.

Reference is made at page 14 of the petition to the case of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), and several of its progeny as somehow bearing upon the issues herein. It is respectfully pointed out that these cases are not applicable to the case at bar. Those cases establish rules for federal courts as to the law to be applied in cases where federal jurisdiction is based solely on diversity of citizenship. In the case at bar, the parties are in a state court seeking to enforce an agreement to arbitrate, and *Erie* does not govern.

POINT II

Petitioner has failed to demonstrate that the decision of the New York Court of Appeals is contrary to the principles of federal law.

The major premise upon which petitioner bases this petition for a writ of certiorari is that the decision of the Court of Appeals of the State of New York is contrary to a "long-established principle of maritime law proscribing consolidation of arbitration proceedings." The Court of Appeals considered this issue and found that there was no such "long-established principle", and that petitioner had failed to establish its contention that federal courts would not or could not order consolidation of two arbitrations in a factual situation such as this, where the only issue involved is common to both proceedings, the responsibility for the $335,000.00 hull damage incurred by the M/V NICOLAS MARIS while on voyage charter to the petitioner.

It is respectfully submitted that the Court of Appeals was correct in its decision. The petitioner has failed to offer any significant authority to support its assertion that consolidation of arbitrations arising out of maritime transactions are proscribed. The cases cited by petitioner in no way support such an assertion.

Certainly the case of *Greenwich Marine, Inc.* v. *S.S. Alexandra*, 225 F. Supp. 671 (S. D. N. Y. 1964) cannot be cited as holding that consolidation of arbitration proceedings by federal courts are proscribed. The question of consolidation is dealt with by the court in that case in a short, two-sentence paragraph at the end of the opinion. The court cites no authorities to the effect that arbitration proceedings cannot be consolidated, and the

decision in that case against consolidation rested at most on discretion.

As to the two unreported companion cases, *Silet Compania De Vapores, S.A.* v. *Luria Brothers & Company, Inc.* and *Compania Maritima Hari Limitada* v. *Luria Brothers & Company, Inc.* (SDNY Docket Nos. 63 ADM 523 and 524, September 9, 1963), they hardly establish a rule proscribing consolidation of arbitrations. The excerpt from the opinion in those cases cited at page 13 of the petition are the only words on the subject written by the court out of a 19 page opinion. The court cites no authorities in support of its decision not to order consolidation of the arbitrations in those cases. It should be pointed out that those cases involved 8 charter parties covering 2 different vessels having separate owners, with stevedore damage claims under each charter. Therefore, it appears that the court felt that consolidation was inappropriate in such a complex situation, and, in the exercise of its discretion, decided not to order it.

The cases of *Institute Cubano de Estabilizacion del Azucar* v. *The Golden West*, 128 F. Supp. 754 (S. D. N. Y. 1955), *aff'd* 246 F. 2d 802 (2nd Cir. 1957), *cert. denied* 355 U. S. 884 (1957), and *Industria E. Comercio de Minerios* v. *Nova Gennesis Societa*, 172 F. Supp. 560 (E. D. Va. 1959), *aff'd* 310 F. 2d 811 (4th Cir. 1962) cannot be cited in support of the proposition that arbitrations are not subject to consolidation by federal courts. A reading of these cases clearly reveals that they do not deal with the issue of consolidation of arbitration proceedings involving a common question of law or fact. Consolidation is nowhere mentioned in these cases.

In view of the foregoing, petitioner's contention that the decision of the New York Court of Appeals contra-

venes a "long-established" principle of federal law is unfounded. The foregoing cases hardly establish the existtence of a "substantive" rule of maritime law that forbids consolidation of arbitration proceedings when the facts warrant it, as they do herein.

On the other hand, the Court of Appeals found that the United States Arbitration Act, 9 U.S.C. §1 *et seq.*, was silent on the question of consolidation, but that there was explicit authority in the Federal Rules of Civil Procedure for consolidation when the factual situation warranted it, specifically, Rules 42(a), which provides for consolidation in situations involving common questions of law or fact, and 81(a)(3), which makes applicable to the federal arbitration act the federal rules of procedure when matters of procedure are not provided for in the former.

That federal courts have the power to consolidate arbitration proceedings involving common questions of law or fact is the view of the American Arbitration Association. In an article, *Consolidation of Arbitration Proceedings by the Courts*, N.Y.L.J. October 14, 1969, the assistant to the general counsel of the Association stated at page 4, column 3:

> "Logic would seem to indicate that if actions involving common questions of law and fact may be consolidated under Rule 42(a), Fed. R. Civ. P., then the courts should have the same discretion when dealing with arbitration proceedings."

A recent case in the federal courts has held that arbitration proceedings may be consolidated. *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Ass'n*, 293 F. Supp. 1400 (S. D. N. Y. 1968), *aff'd*

414 F. 2d 1326 (2nd Cir. 1969). That case involved the consolidation of arbitration proceedings in a labor dispute between an employer and two labor unions. The District Court referred to FRCP 42(a) as one of the sources of its authority to consolidate the arbitrations (293 F. Supp. 1400, 1402).

Therefore, if an application were made to a federal court for consolidation of arbitrations involving a common question of law or fact, it appears that it would have the power to order it, just as a New York Court, in the exercise of its discretion.

POINT III

The decision in the case of *Matter of A/S J. Ludwig Mowinckels Rederi*, 25 NY 2d 576 (1970) is in no way inconsistent with the case at bar.

Petitioner claims that another recent decision of the New York Court of Appeals, *Matter of A/S J. Ludwig Mowinckels Rederi*, 25 N. Y. 2d 576 (1970), conflicts with the decision in the case at bar, therefore, warranting a review of this case by this Court. However, a reading of that case indicates that it is not inconsistent with the case at bar.

In the *Rederi* case, it is clear that had the New York Courts applied CPLR §7502(b) and permanently stayed the arbitration as being time-barred, the explicit statement of federal policy enunciated by the United States Arbitration Act, 9 U.S.C. §2, that a written provision to arbitrate controversies arising "in any maritime transaction . . . shall be valid, irrevocable, and enforceable" would have been disregarded, and the right granted by

9 U.S.C. §2 to arbitrate disputes arising in maritime transactions pursuant to arbitration agreements would have been denied.

In the case at bar, the substantive rights of no party are being denied since the arbitration agreements contained in the charter parties are valid, irrevocable, and enforceable under both CPLR §7501 and 9 U.S.C. §2. In its decision in this case the Court of Appeals specifically considered the *Rederi* case and distinguished it on this basis, stating that:

> ". . . the sole issue involved in the proceeding below in a State court was procedural in nature and its resolution is not in any way determinative of the outcome of the disputes on the merits since it merely involves the question whether two, rather than one, arbitration proceedings are to be used to decide common issues. (Cf. *Matter of Rederi* [*Dow Chem. Co.*], 25 N Y 2d 576.)" Petition, pages 20-21.

The Court of Appeals recognized that in the *Rederi* case, had the CPLR §7502(b) been applied, there would have been *no* arbitration. In the present case, a single, consolidated arbitration with all the parties present, rather than two separate proceedings, will be held to hear and determine disputes involving a single, common issue, the liability for the damage to the vessel. Therefore, the Court of Appeals correctly distinguished the *Rederi* case and found no conflict.

Petitioner has noted that a petition for a writ of certiorari to review the *Rederi* case has been filed in this Court under case No. 1450. In order to complete the record, it should further be noted that said petition has been denied. (N.Y.L.J., June 3, 1970, page 19, column 4.)

CONCLUSION

No substantial federal question was presented by the decision of the Court of Appeals of the State of New York, and for the foregoing reasons, the petition for a writ of certiorari to review said decision of the Court of Appeals should be denied.

Respectfully submitted,

JOSEPH CARDILLO, JR.
Counsel for Respondent
29 Broadway
New York, New York 10006